IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5310 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDSHA AMIRSHA DIWAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5310 of 2001

MR CB DASTOOR for Petitioner No. 1

MR AJ DESAI APP for Respondent No. 1 State

MR MC BAROT for Respondent No. 2-36

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 17/08/2001

C. A. V. JUDGEMENT

1. Rule. Mr. A.J. Desai, learned A.P.P. appears and waives service of notice of rule on behalf of respondent No.1 - State whereas Mr. M.C. Barot, learned

advocate appears and waives the service of notice of rule on behalf of respondent Nos.2 to 36.

2. By filing this petition under Section 439 (2) of the Code of Criminal Procedure ('the Code' for short hereinafter), petitioner - original complainant has challenged the legality and validity of the order dated June 11, 2001 recorded in Criminal Misc. Application No. 312 of 2001 by the learned Sessions Judge, Kheda at Nadiad, whereby he granted regular bail to respondent Nos.2 to 36 herein, who are accused in the criminal case registered with Khambhat Rural Police Station vide C.R.No. I-0053 of 2001 for the offences under Sections 147, 148, 149, 307, 325, 324, 323, 302, 395, 336, 427 and 504 of the Indian Penal Code, and has prayed that bail granted to respondent Nos.2 to 36/accused may be cancelled.

3. From the averments made in the petition as well as the FIR, the prosecution case is that on May 23, 2001 at 3.30 P.M. respondent Nos.2 to 36/accused formed an unlawful assembly and armed with deadly and lethal weapons, with a view to grab the graveyard, assaulted the complainant and witnesses and caused grievous injuries to them and all of them in furtherance of their common intention to commit murder of Amirsha Lallusha Diwan who died during the course of treatment, inflicted injuries on his right leg, hand and head and thereby committed the offences as mentioned in the FIR.

4. On the basis of the FIR, complaint was registered against in all 15 accused who are respondents herein and pursuant to the complaint investigation was put into motion and during the course of investigation by the investigating agency it is divulged that besides 15 accused named in the FIR, 20 other accused persons have participated in the said offence and, therefore, the investigating officer has arrested in all 35 accused who are respondent Nos.2 to 36 herein.

5. All the 35 accused who are respondent Nos.2 to 36 herein have filed Criminal Misc. Application No. 312 of 2001 before the Sessions Court of Kheda at Nadiad for enlarging them on bail wherein they pleaded that they are innocent and have not committed any offence but on suspicion their names have been given by the complainant. They have also averred that they are law abiding persons and permanent residents of village Undel and they would

not jump the bail and would be available any time for the trial or investigation. They, therefore, prayed that they may be enlarged on bail.

6. The learned Sessions Judge after considering the submissions advanced by the learned advocates appearing for the parties and on having perusal of the papers of police investigation, recorded the finding that there is no prima facie case against the respondents/accused for commission of any offence which is punishable with imprisonment for life or death. He also recorded a positive finding that the respondents/accused are not likely to flee nor they are likely to tamper with the prosecution evidence and, therefore, vide order dated June 11, 2001 enlarged the accused/respondent Nos.2 to 36 herein on bail on certain terms and conditions and the said order is now on the anvil before this Court at the instance of the original complainant.

7. It is the case of the petitioner/original complainant that the order passed by the learned Sessions Judge granting bail to respondent Nos.2 to 36 is contrary to law and evidence on record. There is ample evidence against the accused for commission of the heinous crime. The accused have severally beaten the complainant and witnesses with deadly weapons and with a view to grab the graveyard and with an intention to commit murder of witness Amirsha Lallusha Divan they inflicted injuries on his right leg, hand and head and as a result of the injuries he died during the course of treatment. The learned Sessions Judge has ignored the dying declaration of the deceased which is corroborated by the post mortem notes. The learned Sessions Judge has also ignored the recovery of muddamal. It is also contended that it is very difficult to live in the place where the petitioner and his family is residing because of the fact that the accused who are on bail are administering threats to them to hand-over the land of graveyard to them and thereby they have misused the liberty granted to them. Therefore, it is contended that the order granting bail to respondent Nos.2 to 36/accused when there is a prima facie case against them is against the settled principles of granting bail and the petitioner, therefore, prayed that the bail granted to them may be cancelled.

8. Mr. C.B. Dastoor, learned advocate for the petitioner, contended that it is true that normally bail granted by the Court should not be cancelled lightly. However, if there is a strong prima facie case against

the accused for commission of a heinous crime and if the accused on coming out on bail misused the liberty granted to them by giving threat to the complainant or witnesses it is an overwhelming circumstance to cancel the bail granted to them. It is, therefore, contended that the learned Sessions Judge slipped into an error in evaluating the evidence at the stage of bail and in such a heinous and ghastly crime, the learned Sessions Judge ought not to have granted bail to the accused. He also placed reliance on a private complaint filed by the petitioner against five persons who are respondent Nos.1, 7, 8, 14 and 15 herein being Criminal Case No. 1606 of 2001 in the Court of the learned Judicial Magistrate, First Class, Khambhat wherein the allegation is that they have misused the liberty granted to them by giving threat to the complainant, in which the learned Magistrate has issued processes after taking cognizance of the same. He, therefore, contended that bail granted to the respondents/accused may be cancelled.

9. To support the aforesaid contention, Mr. Dastoor placed reliance on the following decisions:

(i) Gurcharan Singh and others v. State (Delhi Administration, AIR 1978, SC 179.
(ii) The State of Gujarat v. Patel Rameshbhai Chaturbhai, 1982 Cr.L.R. (Guj.), 406.
(iii) Prakash Kaur v. Sohansingh, 1984 (1) GLR 345.
(iv) Kanubhai v. Kalabhai, 1986 (1) GLR 308.
(v) Shahzad Hasan Khan v. Ishtaq Hasan Khan, (1987) 2 SCC 684.
(vi) State of Gujarat v. Lalji Popat, 1988 (2) GLR 1073.
(vii) State of Maharashtra v. Anand Chintaman Dighe, AIR 1990 SC 625.
(viii) Chandulal Harilal Lodhiya v. State of Gujarat, 1993 (1) GLR 596.
(ix) State of Orissa v. Rajendra Prasad Bharadia, 1994 (2) Crimes 986 (SC).
(x) The State of Gujarat v. Nilesh @ Munno Rasiklal Patel, 1997 Cri.L.R. (Guj.) 63.

10. Mr. M.C. Barot, learned advocate for respondent Nos.2 to 36/accused, countered the submissions advanced by Mr. Dastoor and contended that there is no prima facie case against the accused and they have not misused the liberty granted to them. The order passed by the learned Sessions Judge releasing the accused on bail was passed on June 11, 2001 and two months have elapsed since

then but no untoward incident has taken place in the same village involving the accused in it and the so-called complaint filed by the petitioner against some of the accused is filed after filing of this petition with a view to create case against the accused wherein the allegation made is that the respondents have misused the liberty granted to them. Mr. Barot further contended that very cogent and overwhelming circumstances are necessary for directing cancellation of bail already granted and in the instant case there is no cogent and overwhelming circumstance which requires to be considered for cancellation of bail granted to the respondents/ accused. He contended that the respondents have not misused the liberty granted to them. They have not tried to interfere or attempted to interfere with due course of administration of justice or evaded or attempted to evade during the course of justice or abused the concession granted to them in any manner. They have not tried to win over the witnesses. He, therefore, urged that the application for cancellation of bail may be dismissed.

11. I have heard Mr. C.B. Dastoor, learned advocate for the petitioner, Mr. A.J. Desai, learned APP for respondent No.1 - State and Mr. M.C. Barot, learned advocate for respondent Nos.2 to 36/accused. I have gone through the averments made in the petition. I have also perused the order passed by the learned Sessions Judge by which bail is granted to the accused and the papers of police investigation supplied by the learned APP during the course of his submissions and a copy of the complaint bearing Criminal Case No. 1606 of 2001 filed by the petitioner against five accused named in the complaint, who are respondent Nos.1, 7, 8, 14 and 15 herein.

12. As per the FIR, accusation against respondent Nos.2 to 36/accused is that on May 23, 2001 at 3.30 P.M. respondent Nos.2 to 36/accused formed an unlawful assembly, armed with deadly and lethal weapons, with a view to grab the graveyard, assaulted the complainant and witnesses and caused grievous injuries to them and all of them in furtherance of their common intention to commit murder of Amirsha Lallusha Diwan, inflicted injuries on his right leg, hand and head who died during the course of treatment and thereby they have committed the offences as mentioned in the FIR.

13. Now on having perusal of the order passed by the learned Sessions Judge, it is seen that on the day of the

incident, 15 accused named in complaint armed with deadly weapons came at the spot of occurrence and asked the complainant to hand-over the land of graveyard and Allarakha, respondent No.2 attacked Sattarbhai, brother of the complainant with a scathe (dharia) whereas Gulab Babar Malekh, respondent No.3, inflicted injuries on Sattarbhai with iron rod and other co-accused have given kick and fist blows. At that time Allarakha and Gulab, respondent Nos.2 and 3 respectively, informed the complainant that they have beaten Amirsha, father of the complainant at the mosque (dargah) and warned him that they may even kill him. Thereafter on raising shouts by the complainant as well as the injured, the accused ran away and the injured was shifted to hospital. Thereafter the complainant came to know from his father that Allarakha, respondent No.2 inflicted scathe blow on his leg whereas Gulab Babar Malekh inflicted injury on his leg with iron rod and rest of the accused gave fist and kick blows. The learned Sessions Judge thereafter recorded that so far as the dying declaration of Amirsha is concerned he has not stated which accused has inflicted injuries on him and, therefore, the learned Sessions Judge has recorded the finding that on the basis of the injuries caused to the witnesses as well as to the deceased there is no case against the respondents/accused for commission of crime which is punishable with death or imprisonment for life and on the basis of the evidence collected by the investigating officer it was not possible for the learned Sessions Judge to negative the plea advanced by the respondents/accused for granting them bail. The learned Sessions Judge has also observed that the respondents are not likely to flee and nor they are likely to win over the witnesses and, therefore, he granted bail on the conditions mentioned in the order.

14. It is settled principles of law that very cogent and overwhelming circumstances are required to be indicated for cancellation of bail. The grounds that can be considered relevant for cancellation of bail are interference or attempt to interfere with due course of administration of justice or evasion or attempt to evade during the course of justice or abuse of the concession granted to the accused in any manner. For this purpose, each case has to be judged on its own merits considering the factual aspects. The powers of cancellation of bail are to be exercised in exercise of judicial discretion and without arbitrariness.

15. I am fortified in my aforesaid view by the following judgments of the Apex Court as well as this Court:

i) Dolat Ram v. State of Haryana (1995) 1 SCC 349,
ii) Subhendu Mishra v. Subrat Kumar Mishra and another, AIR 1999 SC 3026,
iii) Kamuben, w/o. Ramanlal Keshavlal v. Parmar Chamanbhai Narsinhbhai and others, 1997 Cri.L.R. (Gujarat) 75, and
iv) State of Gujarat v. Nilesh alias Munno Rasiklal Patel and others, 1997 Cri.L.R. (Gujarat) 63.

16. The Supreme Court in the case of Puran v. Rambilas and others, 2001 AIR SCW 1935, has held that the concept of setting aside of unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of the fact that some new facts have arisen requiring such cancellation. In paragraph 9 of the said judgment, the Supreme court has further observed that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of the nature like bride burning and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.

17. Applying the aforesaid principles laid down by the Supreme Court in Puran's case (supra) to the facts of the present case, there is no manner of doubt that there is an allegation against respondent Nos.2 and 3 who are the main accused Nos.1 and 2 in the said FIR that they have attacked deceased Amirsha with scathe and iron rod. Though, of course, not on any vital part of the body they have caused as many as six internal injuries which have been noted by the doctor who performed autopsy on the dead-body of Amirsha and the cause of death was shock and haemorrhage following multiple injuries in the scalp. It may be noted that who had caused injuries to him was

conveyed by the deceased to the complainant. Therefore, it is also in the nature of a dying declaration. The fact that the deceased has not stated in his dying declaration recorded by the Executive Magistrate as to which of the accused inflicted injuries upon him cannot dilute the seriousness of the allegation levelled against respondent Nos.2 and 3 in view of the fact that the deceased at the first in point of time had given the names of respondent Nos.2 and 3 as the main assailants to his son as at that time probably the deceased must have been in a good state of health but while recording the dying declaration by the Executive Magistrate he might not have been in a good health and, therefore, he might not have given the names of the assailants.

18. In view of the discussion made hereinabove, I am of the opinion that the learned Sessions Judge has committed grave error in appreciating the evidence at the bail stage when there is ample evidence against respondent Nos.2 an 3 for commission of murder of Amirsha. Therefore, the finding recorded by the learned Sessions Judge is erroneous in law. There is, therefore, a strong prima facie case against respondent Nos.2 and 3 for commission of the offence under section 302 for committing murder of Amirsha which is punishable for imprisonment for life or death and hence bail granted to respondent Nos.2 and 3 herein deserves to be cancelled.

19. So far as rest of the respondents/accused are concerned, it is true that some of the accused whose names have been mentioned in the FIR have played role in causing injuries to other witnesses whereas the persons whose names do not figure in the FIR, there is no mention as to which role they have played in the crime. It is may be true that they were members of an unlawful assembly. In view of the fact that there is no prima facie case against rest of the accused for committing murder of Amirsha though there is a prima facie case against them for causing grievous injuries to the witnesses and looking to the role played by them, I do not deem it expedient to cancel the bail granted to respondent Nos.4 to 36 herein.

20. Seen in the above context, I am of the opinion that the learned Sessions Judge has not exercised the discretion properly in releasing respondent Nos. 2 and 3 herein on bail whereas he has exercised the discretion very rightly in granting bail to respondent Nos.4 to 36

herein. Therefore, the bail granted to respondent Nos.2 and 3 herein deserves to be cancelled whereas the bail granted to respondent Nos.4 to 36 herein deserves to be confirmed.

21. For the foregoing reasons, the petition succeeds in part. The impugned order dated June 11, 2001 recorded by the learned Sessions Judge, Kheda at Nadiad, in Criminal Misc. Application No. 312 of 2001 so far as it relates to releasing respondent Nos.2 and 3 herein on bail is quashed and set aside while the order relating to releasing respondent Nos.4 to 36 herein on bail is upheld. The petition for cancellation of bail qua respondent Nos.2 and 3 is allowed while the petition for cancellation of bail qua respondent Nos.4 to 36 herein is rejected. Respondent Nos.2 and 3 shall surrender to judicial custody forthwith failing which the learned Sessions Judge, Kheda at Nadiad is directed to issue non-bailable warrant to take respondent Nos.2 and 3 herein into judicial custody.

22. Before parting, be it stated that none of the observations made by the learned Sessions Judge while releasing the respondents on bail and by this Court while allowing the petition for cancellation of bail qua respondent Nos.2 and 3 herein and rejecting the petition for cancellation of bail qua respondent Nos.4 to 36 herein shall be construed as an expression of opinion on the merits or demerits of the case and the learned Judge before whom the case comes up for trial shall decide the same in accordance with law and on the basis of the evidence that may be adduced and produced before him without being in any way influenced by the observations made by the learned Sessions Judge and by this Court.

23. For the foregoing reasons and with the above observations, the petition is partly allowed and rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

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24. At this stage, Mr. Barot, learned advocate for

respondent Nos.2 to 36, prays that the above order recorded by this Court may be kept in abeyance for a period of four weeks to enable respondent Nos.2 and 3 to move higher forum. Alternatively, he prays that respondent Nos.2 and 3 may be granted four weeks time to surrender to judicial custody as ordered by this Court.

25. Since this Court has cancelled the bail granted to respondent Nos.2 and 3 and in view of the settled principles of law laid down by the Apex Court and on the facts and circumstances emerging from the record of the case, the prayer made by the learned advocate for respondent Nos.2 and 3 herein to keep the above order recorded by this Court in abeyance cannot be entertained and hence the prayer made by Mr. Barot is rejected. However, in the interest of justice, respondent Nos.2 and 3 are granted three weeks' time to surrender themselves to judicial custody failing which the learned Sessions Judge, Kheda at Nadiad is directed to issue non-bailable warrant to take respondent Nos.2 and 3 into judicial custody.

17.8.2001. (A.M. Kapadia, J.)

(karan)